VIJEYAN KUNJOO A

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR B
SURAYA OTHMAN J
[CRIMINAL APPEAL NO: 41-135-2007]
15 JUNE 2008

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Sentences for two separate charges - Concurrent or consecutive - Principles applicable - One transaction rule - Totality principle - Dangerous Drugs Act 1952, ss. 12(2), 15(1)(a)* C

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Sentences for two separate charges - Excessive sentence - Previous convictions - Gap principle - Whether sentence imposed based on incorrect facts - Dangerous Drugs Act 1952, ss. 12(2), 15(1)(a)* D

The appellant was sentenced for two separate charges under ss. 12(2) and 15(1)(a) of the Dangerous Drugs Act 1952 ('Act') E
ie, drug possession and self-administration or consumption of morphine respectively. The appellant pleaded guilty to the offences at the Magistrate's Court. The magistrate accepted his plea, and convicted and sentenced him to 30 months imprisonment from the date of arrest and one year police supervision under s. 295 of the F
Criminal Procedure Code in respect of the first amended charge, and 16 months imprisonment and two years supervision by a rehabilitation officer under s. 38B of the Act in respect of the second charge, the sentences to run consecutively. The appellant appealed against the excessive sentence and the magistrate's order G
for the term of imprisonment to run consecutively. The two issues requiring determination were: (i) whether the offences in this appeal were of the same nature or one and the same transaction so as to have warranted a concurrent rather than a consecutive term of imprisonment; and (ii) whether the magistrate had rightly H
considered the record of the previous convictions of the appellant in reaching her decision.

Held (allowing the appeal):

I

(1) The two principles used by the courts in meting out either a consecutive or concurrent sentence are, respectively, the one transaction and the totality principle. In this instance, the

A appellant was charged with possession of a mixture of heroin and monoacetylmorphine, and with consumption or self-administration of the morphine drug into his body. This was evident from his urine test which proved positive for morphine. The question here was whether the two offences could be
B considered as falling into one and the same transaction principle so as to warrant a concurrent sentence. The drugs was found in the appellant's right pocket, the amount was rather small (1.33 grams) and he tested positive for morphine. From these facts, it could be safely inferred that the drugs
C found in his possession were for his own consumption, which in fact was conclusively proved by the positive urine test. The two charges also showed that they were so connected together in terms of time, place and the drugs found and consumed. Therefore, the one or same transaction principle
D should apply. Furthermore, taking into account the totality principle, the sentences should be concurrent and not consecutive. *Sau Soo Kim v. PP* (foll). (paras 9, 16 & 21)

(2) The magistrate had seriously erred when she took into
E account matters which did not exist and imposed a sentence based on the wrong set of facts. Instead of four previous convictions for drugs, the appellant only had two and that also in 1989 and 1999, a gap of ten years and with the present case in 2007, another gap of eight years. In that light, the
F magistrate should have used the gap principle in imposing the appropriate sentence. Therefore, it would seem that the appellant did try to stay away from drugs but in the end, the drugs got the better of him. He did put in the effort; the gap of ten, then eight years were testimonies to his attempts and
G this fact should have operated as a mitigating rather than an aggravating factor. Thus, the magistrate had not rightly considered fully the appellant's record of previous convictions when she made her decision. She considered some, omitted others and introduced non-existent factors that aggravated her
H sentence. On this premise, the sentence imposed by the magistrate was on the excessive side. *Zaidon Shariff v. PP* (foll). (paras 24, 25, 26 & 27)

[Sentences preserved but to run concurrently from date of arrest. One-year
I *police supervision for first amended offence set aside but two-year supervision by rehabilitation officer for second offence maintained.]*

Case(s) referred to:
Abu Seman v. PP [1981] 1 LNS 181 ***(refd)***
Amrita Lal Hazra & Ors v. Emperor ILR 42 Cal 957 ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Emperor v. Ghulam wd Sarang & Ors [1908] Cr LJ 191 ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 LNS 33 ***(refd)***
PP v. Loh Ang Sing [1964] 1 LNS 145 ***(refd)***
R v. Bibbings [1918] 13 Cr App Rep 205 ***(refd)***
R v. Faulkner [1972] 56 Cr App R 594 ***(refd)***
R v. Hockey [1980] Crim LR 594 ***(refd)***
R v. Nuttall [1908] 1 Cr App 180 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 ***(foll)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 295
Dangerous Drugs Act 1952, ss. 12(2), (3), 15(1)(a), 38B
Subordinate Courts Act 1948, s. 102(a)

Other source(s) referred to:
DA Thomas, *Principles of Sentencing*, 2nd edn, pp 57-58
Emmins on Sentencing, 2nd edn, p 151

For the appellant - In person
For the prosecution - Shamsul Sulaiman DPP

Reported by Suresh Nathan

JUDGMENT

Suraya Othman J:

[1] This was an appeal by the appellant who was sentenced for two separate charges under ss. 12(2) and 15(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ("DDA Act"). The appeal was against the excessive sentence and the learned magistrate's order that the term of imprisonment for the two charges were to run consecutively one after another. The two issues that required determination are:

(1) whether the offences in this appeal were of the same nature or one and the same transaction so as to have warranted a concurrent rather than a consecutive term of imprisonment; and

A (2) whether the magistrate had rightly considered the record of the previous convictions of the accused to come to her decision.

[2] The first amended charge read as follows:

B Bahawa kamu pada 24/1/2007 jam lebih kurang 12.00 tengah hari di Jalan Sarawak off Jalan Pudu, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur, telah ada dalam milikan kamu dadah berbahaya iaitu satu (1) paket plastik dan empat (4) tiub straw mengandungi heroin dan monoacetylmorphine seberat 1.33 C gram (berat bersih) dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

[3] The second charge read as follows:

D Bahawa kamu pada 24/1/2007 jam lebih kurang 12.00 tengah hari di Jalan Sarawak off Jalan Pudu, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur, melalui ujian air kencing didapati kamu memasukkan dadah 'Morphine' ke dalam badan kamu sendiri, oleh yang demikian kamu telah melakukan suatu E kesalahan di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 (Pindaan Akta A1167/2002) dan kamu boleh dihukum di bawah seksyen 15(1)(a) Akta yang sama.

[4] Therefore the first charge was for drug possession and the second, for self administration or consumption of morphine.

F

[5] The appellant at the magistrate court pleaded guilty to the offences and the learned magistrate accepted his plea, convicted and sentenced him to 30 months imprisonment from the date of arrest and one year police supervision under s. 295 of the Criminal G Procedure Code (F.M.S Cap. 6) ("CPC") in respect to the first amended charge and 16 months imprisonment and two years supervision by a rehabilitation officer under s. 38B of the DDA Act in respect to the second charge. The sentences were to run consecutively one after another.

H **[6]** The appeal therefore was against the excessive sentence and the learned magistrate's order for the term of imprisonment to run consecutively.

I

(1) Whether The Offences In This Appeal Were Of The Same Nature Or One And The Same Transaction So As To Have Warranted A Concurrent Rather Than A Consecutive Term Of Imprisonment

[7] In considering the first issue, the empowering provision regulating the powers of a Magistrate Court in meting out sentences over conviction of several offences at one trial is provided under s. 102 of the Subordinate Courts Act 1948 (Act 92) which read as follows:

> 102. Sentence in case of conviction for several offences at one trial.
>
> When a person is convicted at one trial of any two or more distinct offences a Magistrates' Court may sentence him for those offences to the several punishments prescribed therefore which the court is competent to inflict, **the punishments when consisting of imprisonment to commence the one after the expiration of the other** in such order as the court may direct, **or to run concurrently** if the court shall so direct, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which is competent to inflict on conviction of one singly offence, to send the offender for trial before a higher court:
>
> Provided that:
>
> (a) *in no case shall the person be sentenced to periods of imprisonment amounting in the aggregate to more than twenty years;*
>
> (b) the aggregate punishment shall not exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict; and
>
> (c) when imprisonment is directed in default of payment of a fine or of costs or compensation ordered under the authority of any law for the time being in force, the imprisonment shall be consecutive to any other term or terms of imprisonment so directed and to any sentence of imprisonment otherwise imposed.

[8] Under s. 102 of the Subordinate Courts Act 1948, a magistrate has the power to order the terms of imprisonment to run either consecutively or concurrently if an accused is charged with several offences and thereby convicted at one trial. This power is however limited to a maximum of twenty years under proviso (a) of s. 102.

[9] What therefore is the guideline used by the courts in meting out either a consecutive or a concurrent sentence? From decided cases there are mainly two principles used namely the one transaction and the totality principle.

[10] The one transaction principle or also known as the same transaction principle has been explained in many cases. In *Amrita Lal Hazra & Others v. Emperor* ILR 42 Cal. 957 the court held that there are four main tests which help in the legal determination as to what amounts to "the same transaction". They are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. It is interesting to note that in establishing the four main tests, the Indian court also made the following observation:

> A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "same transaction"; **the circumstances which must bear on its determination** in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

[11] In the case *Emperor v. Ghulam wd. Sarang and Others* [1908] Cr LJ 191 it was held:

> The expression "same transaction" used in section 235 and 239 has not been defined in the Code, but the illustrations to the sections make the intention of the legislature, sufficiently clear. If a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose, or by the relations of cause and effect, the accused may be charged with, and tried at one trial for every offence committed in such series of acts. If more persons than one are accused of different offences, committed in series of acts so connected, they may be tried together.

[12] Referring to the case *Amrita Lai Hazra & Others v. Emperor (supra)*, there are actually no fixed rules as to the test in determining what makes offences distinct from one another. However in one local case, *Public Prosecutor v. Loh Ang Sing* [1964] 1 LNS 145; [1965] 2 MLJ 129 it was decided that:

> The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However it is not necessary that all of them should be present to make the

> several incidents parts of the same transaction. The main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction.

[13] In *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 Augustine Paul JCA, as he then was, explained that the court would be guided by the one transaction rule:

> The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design as explained earlier.

[14] See also *Abu Seman v. PP* [1981] 1 LNS 181; *PP v. Wong Kok Sein & Ors* [1988] 1 LNS 33; [1988] 2 MLJ 436; *R v. Hockey* [1980] Crim LR 594 which expounded on the same principle.

[15] Therefore to make the several incidents parts of the same transaction, there must be present these essential elements namely proximity of time, proximity of place, continuity of action and finally continuity of purpose or design.

[16] In our present case, the appellant was charged with possession of 1.33 grams mixture of heroine and monoacetylmorphine and with consumption or self administration of the morphine drug into his body. This was evident from his urine test which proved positive for morphine. The question here is whether the two offences could be considered as falling into one or same transaction principle so as to warrant a concurrent sentence. The drug was found in the appellant's right pocket. The amount was rather small (1.33 grams) and he tested positive for morphine. From these facts it can be safely inferred that the drugs found in his possession were for his own consumption and in fact from the positive urine test, it conclusively proved so. The two charges also

showed that they are so connected together in terms of time, place and the drugs found and consumed. Therefore all the four elements were present and the one or same transaction principle should apply.

[17] Let us now look at the totality principle. The totality principle imposes restrictions on the power of the courts to pass consecutive sentences. The court has to look at all the sentences imposed and see whether the sum total or the amount in their totality are excessive and if excessive, order them to run concurrently or partially concurrent and partially consecutive (see *R v. Faulkner* [1972] 56 Cr App R 594).

[18] In explaining the totality principle, Augustine Paul in *Bachik Abdul Rahman (supra)* referred to the view of DA Thomas in *Principles of Sentencing* (2nd edn) at pp 57-58:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.

[19] In this regard reference is also made to *Emmins on Sentencing* (2nd edn) p 151:

> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

[20] In *Sau Soo Kim v. PP* [1975] 1 LNS 158 the Federal Court allowed a sentence to run concurrently if the offences or charges were of the same nature. In this case the sentence for possession of firearms and possession of ammunition were allowed to run concurrently because they were of the same nature but the sentence for discharging a firearm towards a group of policemen were made consecutive.

[21] In our present case, the offences of possession and consumption of drugs can be deemed to be of the same nature as decided by *Sau Soo Kim*'s case *(supra)*; it can also be deemed as a one or same transaction offences and taking into account the totality principle, the sentences imposed should be concurrent and not consecutive. In that light, I accordingly allow the appeal to set aside the consecutive sentence. The sentences therefore are to run concurrently.

(2) Whether The Magistrate Had Rightly Considered The Record Of The Previous Convictions Of The Accused To Come To Her Decision

[22] The second issue to be decided is whether the learned magistrate had rightly considered the record of the previous convictions of the appellant in coming to her decision. From the grounds of her judgement, the learned magistrate noted that the appellant had four previous convictions for drugs commencing from 1989 to 2002, the present case being his fifth conviction under the same offence under the DDA Act. The learned magistrate stated that the appellant was sentenced to two years imprisonment and RM2,000 fine with a year of police supervision for the 2002 drug offence and as such concluded that the appellant was a habitual, unrepented drug offender and a deterrent sentence was paramount in the circumstances.

[23] Upon close scrutiny of the previous conviction record (P7) I found no such conviction for drugs for the year 2002. Instead there were only two previous convictions for drugs under s. 12(3) DDA Act for the year 1989 and 1999 where the appellant was sentenced to four months and six months imprisonment respectively. The other two convictions were for running away from the Pusat Serenti Rehabilitation Centre where he was sentenced to eight months imprisonment and another conviction under the Minor Offences Act 1955 (Act 336) for possession of goods suspected to be stolen where he was sentenced to 12 months imprisonment.

[24] Therefore the learned Magistrate had seriously erred when she took into account matters which were not in existence and imposed a sentence based on the wrong set of facts. Instead of four previous convictions for drugs, the appellant only had two and that also in 1989 and 1999, a gap of ten years and with the

present case in 2007, another gap of eight years. In that light, the learned magistrate should have used the gap principle in imposing the appropriate sentence. In *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441, his Lordship Augustine Paul J (as he then was) at p. 447 state:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned Magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour.

[25] Also refer to *R v. Nuttall* [1908] 1 Cr. App. 180 and *R v. Bibbings* [1918] 13 Cr. App Rep 205 for guidelines on the same principle.

[26] And in *Soosainathan v. PP* [2001] 6 CLJ 44 it was held that the longer the gap between a previous conviction and the current offence, the greater the mitigatory effect.

[27] From the facts therefore it would have seem that the appellant did try to stay away from drugs but in the end it got the better of him. He did put in the effort; the gap of ten, then eight years are testimonies to his attempts and this fact should have operated as a mitigating rather than an aggravating factor. Therefore, I find that the learned magistrate had not rightly considered fully the appellant's record of previous conviction when she made her decision. She considered some, omitted others and introduced non-existence factors which aggravated her sentence. On this premise, I feel the sentence imposed by the learned magistrate is on the excessive side and I duly made this order.

[28] The thirty months imprisonment for the first amended offence and the 16 months imprisonment for the second offence are preserved but are to run concurrently from the date of arrest. The one year supervision by the police for the first amended offence under s. 295 CPC is set aside but the two year supervision by a rehabilitation officer under s. 38B of the DDA is maintained. One order of supervision is more than sufficient since to allow both would be overlapping and amounts to hardship for the appellant.

[29] Appeal allowed.